

Kevin A. Lake  
VANDEVENTER BLACK LLP  
Eighth & Main Building  
707 E. Main Street, Suite 1700  
P.O. Box 1558  
Richmond, VA 23218-1558  
Tel: 804.237.8811  
Fax: 804.3147.8801  
[klake@vanblk.com](mailto:klake@vanblk.com)

**UNITED STATES BANKRUTPCY COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

In re: ) Chapter 11  
 )  
CIRCUIT CITY STORES, INC., et al., ) Case No. 08-35653-KRH  
 )  
Debtors. ) Jointly Administered  
 )  
 )  
 )

---

**APPLICATION OF SHELBYVILLE ROAD PLAZA, LLC FOR AN ORDER  
ALLOWING ADMINISTRATIVE CLAIM RELATING TO POSTPETITION  
CHARGES UNDER LEASE FOR STORE #877 (LOUISVILLE, KY)  
AND MEMORANDUM IN SUPPORT**

COMES NOW Shelbyville Road Plaza, LLC, successor-in-interest to Hagan Development and Hagan Properties, Inc. (“SRPL”), by its counsel, and seeks an Order allowing its administrative claim for rent and other charges accruing post-petition under its lease with Debtor, pursuant to 11 U.S.C. §§ 365(d), 503(b) and 507(a).<sup>1</sup> In support of this Application, SRPL states as follows:

*BACKGROUND*

---

<sup>1</sup> The Lease is not attached to this application, but it will promptly be made available to the Debtor and/or other appropriate parties-in-interest upon request.

1. On November 10, 2008, Circuit City, Inc. and its affiliated debtors (the “Debtors”) filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in this Court.
2. SRPL is the landlord/owner for a store operated by Debtor and known as Store # 877 located in Louisville, KY (the “Leased Premises”). The Debtor leased the Leased Premises from SRPL.
3. The Debtors rejected the Lease and the effective rejection date was March 12, 2009 (the “Rejection Date”) pursuant to an Order of this Court.

*RELIEF SOUGHT*

4. SRPL seeks an allowed administrative claim for charges that accrued postpetition and through the Rejection Date under the Lease. The charges are detailed as follows:
- 5.

<u>Date</u>	<u>Description of Charge</u>	<u>Basis of Charge</u>	<u>Amount</u>
11/10/08	Stub Rent (21 days at \$1,909.1414 per diem rent) <sup>2</sup>	Per Lease, ¶5(c)	\$40,091.97
1/1/09-3/12/09	Pro-rated 2009 Real Property Taxes (\$50,074.48 est. 2009 assessment--- \$137.19 per diem x 71 days) <sup>3</sup>	Lease, ¶5(c)	\$9,740.49
11/10/08-3/31/09	Attorneys Fees <sup>4</sup>	Lease, ¶36(f)	\$7,164.46
	<b>Total Administrative Expense Claim not less than:<sup>5</sup></b>		<b>\$56,996.92</b>

---

<sup>2</sup> SRLP is aware that the Court has previously denied various Objecting Landlords’ request for immediate payment of the November rent administrative claim [docket no. 1347]. By this Motion, SRLP seeks approval of its Administrative Claim to be paid at the same time and to the same extent as all other administrative rent claimants. The stub rent figure includes pro-rated CAM and 2008 real estate taxes. Under the Lease, base monthly rent is \$51,700.00; monthly estimated CAM is \$3,750.00, and monthly estimated taxes are \$2,619.72.

<sup>3</sup> The real property tax assessment for calendar year 2009 is \$50,074.48 or \$137.19 per diem. In the event that this Court’s conclusion that the “accrual method” applies in the Fourth Circuit is reversed on appeal, SRP reserves the right to assert that it is entitled to recover the entire amount of the 2009 Real Property Taxes as an administrative expense under the “billing method”. See Opinion at 7-12.

<sup>4</sup> Attorneys fees represent fees incurred by Shelbyville Road Plaza, LLC and/or its assignee, Hagan Properties, Inc. through March 31, 2009, which are the Debtor’s responsibility under the Lease. Shelbyville Road Plaza, LLC will produce copies of its attorney fee statements upon request and reserves the right to amend its claim for attorneys fees as necessary.

6. Section 365(d)(3) mandates that the Debtors pay all post-petition obligations arising under the Lease until the lease is rejected. *In re Klein Sleep Products, Inc.*, 78 F.3d 18, 30, n.7 (2nd Cir. 1996); *In re Dial-A-Tire, Inc.*, 78 B.R. 13, 16 (Bankr. W.D.N.Y. 1987) (Section 365(d)(3) requires continued performance under a lease until the lease is rejected). The rejection of a lease and the termination of obligations under Section 365(d)(3) do not occur until an order is entered rejecting the lease. *In re Thinking Machines Corp.*, 67 F.3d 1021, 1028 (1<sup>st</sup> Cir. 1995). Moreover, Section 503(b) of the Bankruptcy Code permits landlords to obtain administrative claims for post-petition charges for rents, taxes, CAM charges, etc. See 11 U.S.C. § 503(b) (“After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including-- (1)(A) the actual, necessary costs and expenses of preserving the estate . . .”).
7. There can be no real dispute that the Debtors’ post-petition use of the Leased Premises qualifies as an “actual, necessary” cost of preserving the estate. *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d 624, 627 (3d Cir. 1990) (“There is no question, of course, that the payment of rent for the use and occupancy of real estate...is clearly an ‘actual, necessary’ cost of preserving the estate.”). Accordingly, the charges above are proper, allowable administrative expenses. *In re ZB Co., Inc.*, 302 B.R. 316, 319 (Bankr. D. Del 2003) (“Section 503(b)(1)(A) grants an allowed administrative claim for the ‘actual, necessary costs and expenses of preserving the estate...’”).

**WHEREFORE**, SRPL requests the Court to grant the relief herein and to award such other relief as this Court deems appropriate.

---

<sup>5</sup> SRPL has this day also filed a proof of claim reflecting prepetition rent claims, lease rejection damages, and these same administrative rent claims and other charges.

Respectfully Submitted,

Dated: April 30, 2009

**VANDEVENTER BLACK LLP**

/s/ Kevin A. Lake

Kevin A. Lake  
Eighth & Main Building  
707 E. Main Street, Suite 1700  
P.O. Box 1558  
Richmond, VA 23218-1558  
Tel: 804.237.8811  
Fax: 804.3147.8801  
[klake@vanblk.com](mailto:klake@vanblk.com)

*Counsel for Shelbyville Road Plaza, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of this Motion and Notice of Motion and Hearing to all parties receiving notice via ECF on April 30, 2009:

/s/ Kevin A. Lake  
Kevin A. Lake